In The

SUPREME COURT OF THE UNITED STATES

No. 75-1291

CONVALESCENT CARE, INC.,
Petitioner,

vs.

CHARLES W. BATES, DIRECTOR,
OHIO DEPARTMENT OF PUBLIC WELFARE, et al.,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In the opinion of the respondents the following questions are presented for review:

I. Can the respondent, Ohio Department of Public Welfare, refuse to renew petitioner's contract (provider agreement) to care for welfare recipients without affording petitioner a prior hearing regarding the validity of respondent's grounds for refusing to renew the contract without violating petitioner's right to due process under the 5th and 14th Amendments to the Constitution of the United States?

II. Does the enforcement by respondent of federal standards which are substantially more stringent than existing state standards against petitioner result

in the federal government's invasion of powers reserved to the states, in contravention of the 10th Amendment to the Constitution of the United States?

STATEMENT OF THE CASE

Under Title XIX, Social Security Act (42 U.S.C. § 1396, *et seq.*), states are required as a condition of federal financial participation in Medicaid, to enter into provider agreements with qualified nursing homes by which the individual homes agree to provide services to Medicaid recipients and the state agrees to make payments for such services directly to the home. To determine whether the provider meets federal standards the state agency must obtain a statement of compliance from the state health department. This statement is called "certification." 45 C.F.R. § 249.33.

Without such certification the Ohio Department of Public Welfare may not enter into a provider agreement. Even with such certification, however, the welfare department may choose not to enter into a provider agreement for reasons not a part of the certification process, such as inadequate services of medical personnel or past fraud in obtaining payment. Three classes of Medicaid nursing home provider agreements exist: skilled care, intermediate care, and rest home care. Requirements for certification vary between the three levels of care. For example, the National Life Safety Code must be satisfied for skilled care facilities but not for intermediate care facilities. 45 C.F.R. § 249.33 (a) (1) (vii).

The petitioner owns and operates a skilled nursing home in Canton, Ohio, licensed by the Ohio Department of Health pursuant to 45 C.F.R. § 249.33 as a skilled nursing

home indicating compliance with federal requirements which would authorize the home to contract to care for certain welfare patients. The home then contracted, pursuant to Section 5101.51, Ohio Revised Code, with the Ohio Department of Public Welfare to provide skilled nursing care to welfare recipients for a specified rate and for a specified period of time.

The respondent was under a preliminary injunction in *Shady Acres Nursing Home, Inc.* v. *Canary*, 316 N.E. 2d 481, 39 Ohio App. 2d 47 (1973), to terminate no providers until resolution of a variety of issues. Petitioner's provider agreement with the Ohio Department of Public Welfare expired during the pendency of that injunction, on June 30, 1973, but payments were continued pursuant to the injunction. After the expiration of petitioner's provider agreement the Ohio Department of Health took steps to recertify the home, but such recertification was never made because of petitioner's failure to correct deficiencies and to comply with the Life Safety Code. On September 12, 1974, petitioner was advised by leter from the respondent Ohio Department of Public Welfare that because of his failure to satisfy the Life Safety Code the Ohio Department of Health had failed to certify his compliance with federal regulations, and thus respondent could not enter into a new provider agreement and would terminate Medicaid payments on October 12, 1974.

Prior to the termination of payments petitioner filed the instant action in the Common Pleas Court of Franklin County, Ohio where his motion for a preliminary injunction was denied and his complaint was subsequently dismissed. From that dismissal the petitioner appealed to the Franklin County, Ohio, Court of Appeals which court overruled petitioner's assignments of error and affirmed the de-

cision of the trial court. The Supreme Court of Ohio overruled petitioner's motion to certify without opinion.

The petitioner was notified by the letter of September 12, 1974, that he could request a hearing on the refusal of the Ohio Department of Public Welfare to renew his provider agreement, but that he had no right to an evidentiary hearing prior to termination of payments because his provider agreement was not being revoked but had, indeed, expired. The respondent has asserted, and prevailed on such assertion in the state courts, that the petitioner was denied no due process rights by the decision of the respondent not to renew his provider agreement. Since the state courts have decided the questions of law in this case in accord with applicable decisions of this Court, the respondents submit that the petition for writ of certiorari should be denied.

ARGUMENT

I. Can the respondent, Ohio Department of Public Welfare, refuse to renew petitioner's contract (provider agreement) to care for welfare recipients without affording petitioner a prior hearing regarding the validity of respondent's grounds for refusing to renew the contract without violating petitioner's right to due process under the 5th and 14th Amendments to the Constitution of the United States?

It is settled law that upon the expiration of a contract (which a provider agreement is), no due process rights attach and thus no hearing is required prior to a refusal to renew such contract. In *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services*, 542 P. 2d 1,

125 Cal. Rptr. 265 (1975), the California Supreme Court clearly decided that due process did not require the California Department of Health Care Services to grant a hearing to a nursing home prior to a determination by the department not to renew a contract with the facility for the care of welfare patients. In that decision the Court stated:

> "We conclude that Paramount's interest in the renewal of the provider contract amounted only to a hope or a unilateral expectation of renewal rather than to a legal entitlement. But we do not intend to imply by this holding that the department may arbitrarily refuse to enter into a contract with a nursing home which meets the requirements of federal and state law. Rather, the effect of the provisions described above is to place upon a facility, as a condition of the renewal of its contract, the burden of demonstrating annually that it complies with the appropriate standards. If the department determines not to renew a contract because of an alleged failure to conform to those requirements a nursing home may challenge the propriety of the refusal by the very means which Paramount employed in the present proceeding, i.e., by seeking a writ of mandate alleging compliance with the regulations, and an order to compel the department to enter into a contract. We do not perceive any constitutional impediment to imposing such a requirement upon a profit-making institution which desires to participate in a government-funded program." 542 F. 2d at 6-7; 125 Cal. Rptr. at 270-271.

Similarly the Franklin County, Ohio, Court of Appeals decided in the case of *Shady Acres Nursing Home, Inc.* v. *Canary, supra,* that no hearing need be held upon expiration of a nursing home provider agreement. There in a class action brought by skilled nursing homes, the Court held, *inter alia*:

> "As pointed out, even the appellee agrees that the renewal of a provider agreement, or recertification, cannot be accomplished unless there is a compliance with federal statutes and regulations. The necessary holding, therefore, according to conclusions in this decision, *ante*, is that the lapsed provider agreements terminated by the included provisions do not require a hearing, there being no property interest involved demanding such an exercise of 'due process.'" 316 N.E. 2d at 492; 39 Ohio App. 2d at 65.

In addition, the California Supreme Court in *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra,* addressed one of the main contentions of the petitioner herein, i.e. that the effect of respondent's action on petitioner's business creates the right to a due process hearing as a condition of nonrenewal of petitioner's contract. The Court stated:

> "We recognize that the refusal of the department to renew a provider agreement may seriously affect a nursing home's business. Nevertheless, this factor alone cannot be deemed decisive. For any vendor of goods or services to the state may be equally damaged if it has become dependent upon government purchases for a substantial portion of its income and the state chooses not to renew a purchasing contract. Yet no one would suggest that the vendor's dependence upon government purchases alone results in a legal entitlement to a new contract or that the vendor is entitled to a due process hearing as a condition of nonrenewal." 542 P. 2d. at 8; 125 Cal. Rptr. at 272.

The rationale in *Paramount* and *Shady Acres* follows the case of *Board of Regents* v. *Roth,* 408 U.S. 564, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972), in which the United States Supreme Court held that a non-tenured faculty member does not have a liberty or a property interest in his con-

tinued employment upon a refusal to renew his contract. This principle was earlier accepted by the United States Sixth Circuit Court of Appeals in *Orr* v. *Trinter,* 444 F. 2d 128 (6th Cir., 1971). The analogy between *Board of Regents* v. *Roth, supra,* and the instant case is readily apparent. Both cases involve fixed term contracts between state agencies and individuals. Further, both cases involve the nonrenewal of such contracts. Indeed, the basis for the *Roth* decision is that any property interest which exists by way of an individual contracting with the state terminates upon the expiration of that agreement. That is precisely the position of respondent in this case.

The concept of tenure figured importantly in *Board of Regents* v. *Roth, supra,* and *Perry* v. *Sindermann,* 408 U.S. 593, 33 L. Ed 2d 570, 92 S. Ct. 2694, (1972). In the *Perry* case the Court held that formal tenure need not be present to create a property right. Of course, actual tenure for a teacher creates a continuing contractual situation. *Perry* held that a de facto tenure system may exist, and that an "expectancy" of employment can result in a property right which cannot be affected without affording due process of law. But this "expectancy" of continuing employment has been viewed restrictively. For example, in the case of *Patrone* v. *Howland Schools Board of Education,* 472 F. 2d 159 (6th Cir., 1972), a teacher had eight successive one year teaching contracts and the local board decided not to renew his contract. They gave no statement of reasons for the nonrenewal and gave no hearing. The Sixth Circuit Court of Appeals decided that in spite of eight successive one year contracts there was no expectancy of continued employment shown. Upon expiration of a state employment contract not only do all procedural due process requirements (*i.e.* a hearing prior to termination) cease, but the individual involved cannot assert substantive due

process rights as to the nonrenewal. Unless another constitutional right is affected by the nonrenewal, it may be accomplished even for arbitrary reasons. *Jeffries* v. *Turkey Run Consol. School Dist.*, 492 F. 2d 1 (7th Cir., 1974).

The petitioner has cited in his Petition for a Writ of Certiorari (pp. 20-24) several recent decisions of the United States Supreme Court in the area of due process which he contends are controlling as to the question of whether he has a right that is protected by the due process clause of the federal constitution. He contends that those cases establish such a right. The respondent asserts, however, that only *Board of Regents* v. *Roth, supra,* and *Perry* v. *Sindermann, supra,* which were discussed previously in this brief, are applicable to the instant case and that the other eight Supreme Court cases cited by petitioner can be distinguished on the basis that they did not involve the failure to renew a contract upon its expiration. Their reasoning is therefore not persuasive in the present context. We submit that the *Roth* and *Perry* decisions, particularly Roth, are more nearly on point with the instant situation since they were concerned with any possible due process rights arising out of a contractual agreement upon its expiration. We further submit that the *Roth* decision, together with *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra,* and *Shady Acres Nursing Home, Inc.* v. *Canary, supra,* supports the decisions of the state courts that petitioner had no due process right which was violated by a decision by respondent Ohio Department of Public Welfare not to renew petitioner's provider agreement. This Court should deny the petition for writ of certiorari.

II. Does the enforcement by respondent of federal standards which are substantially more stringent than existing state standards against petitioner result in the federal government's invasion of powers reserved to the states, in contravention of the 10th Amendment to the Constitution of the United States?

Petitioner's Tenth Amendment argument is premised upon the assumption that his due process argument is correct, *i.e.* that respondent has denied petitioner the procedural safeguards to which he is entitled. However, respondent contends that it has provided petitioner with all procedural rights to which he is entitled under the present state of the law. See *Board of Regents* v. *Roth, supra; Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra;* and *Shady Acres Nursing Home, Inc.* v. *Canary, supra.* The state courts have agreed with respondent's contention.

The petitioner has cited in support of his Tenth Amendment argument the case of *Goldstein* v. *California*, 412 U.S. 546, 37 L. Ed. 2d 163, 93 S. Ct. 2303 (1973). This case, while quoting some comments of Alexander Hamilton from the Federalist papers, is a copyright case and is in no way factually related to the instant case. Petitioner has taken one paragraph out of context from the *Goldstein* case and has used it as the sole authority for his argument that respondent has violated the Tenth Amendment to the Constitution of the United States. Respondent submits that petitioner's Tenth Amendment argument hardly constitutes a substantial constitutional question. Therefore this Court should deny the petition for writ of certiorari.

CONCLUSION

The respondent submits that this case does not present significant constitutional issues. We further submit that the state courts have decided the issues in this case in accord with applicable decisions of this Court.

The respondent has no power to revoke petitioner's license to operate a nursing home in the State of Ohio and accept those patients which he chooses. Respondent only has the power to refuse to enter into a provider agreement with petitioner, thereby denying to him payments on behalf of Medicaid patients which he might accept. The chance that such refusal might harm Medicaid patients by denying them care would be minimal, because Medicaid patients in such a home would merely be transferred to one of the many nursing homes with which the respondent has a provider agreement in effect. In fact the Medicaid patients would be benefitted because they would then be in a home for which the respondent has received a certification that fire, health and safety standards had been met.

As to the constitutional due process issue alleged by petitioner, that issue was decided by the California Supreme Court in *Paramount Convalescent Center, Inc.* v. *Department of Health Care Services, supra,* and substantially the same issue was decided by the United States Supreme Court in *Board of Regents* v. *Roth, supra.* Although petitioner states that all of the due process cases of the United States Supreme Court relied on by him were decided after *Shady Acres,* actually only three of the nine Supreme Court cases cited by him were decided after *Shady Acres* and none of the cases which he cited were decided after *Paramount.* The respondent submits that petitioner's cases are distinguishable and do not displace *Paramount, Shady Acres* and *Roth* as the controlling decisions in this area. Thus

the constitutional due process issue has been previously addressed by the courts and does not constitute a substantial constitutional question.

Finally the respondent submits that petitioner's constitutional argument concerning Tenth Amendment violations is frivolous. Petitioner cites no authority for this proposition and no cases in which even similar issues were considered. Respondent submits that this issue most certainly does not constitute a substantial constitutional question. This Court should deny the petition for writ of certiorari.

Respectfully submitted,

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